No. 87-2091

In The

Supreme Court of the United States

October Term, 1988

ALLIED VAN LINES, INC.,

Petitioner,

vs.

ANDREW WILKERSON,

Respondent,

-and-

FRUEHAUF TRAILER, A Division of Fruehauf Corporation,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT ANDREW WILKERSON

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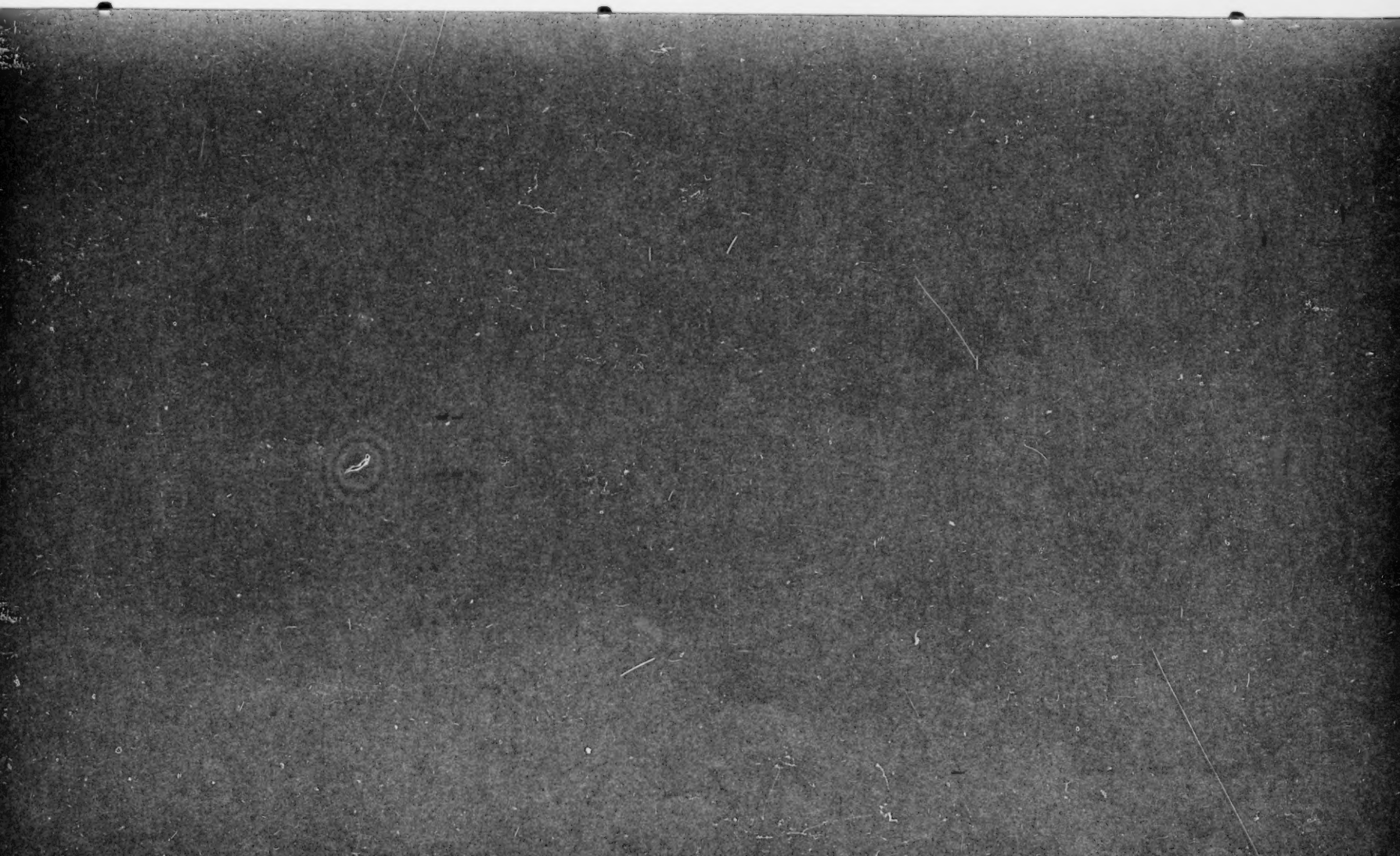

QUESTION PRESENTED

Do the provisions of the Interstate Commerce Act at 49 U.S.C. §§ 304 and 315, and I.C.C. Regulations at 49 C.F.R. § 1057, *et seq.* under which an I.C.C. licensee is liable to shippers and to the public for negligent maintenance and/or operation of a vehicle by its owner-operator, extend to include liability for injuries sustained by a passenger in the vehicle who had completed his day's work as a loader of the truck before the vehicle was moved, and who, when he did work for the owner-operator, was only an occasional, part-time furniture loader, hired for a number of hours of work, exclusively intrastate, to help load furniture onto the vehicle, but not drive the vehicle.

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COUNTERSTATEMENT OF THE CASE

A. Counterstatement of Facts

Petitioner Allied Van Lines is a Delaware Corporation operating as a common carrier in interstate commerce, engaged in the transportation of household goods, pursuant to authority granted to it by the Interstate Commerce Commission in its Certificate of Public Convenience and Necessity, No. MC-15735 and various sub-numbers. On June 16, 1977, respondent Andrew Wilkerson incurred catastrophic personal injuries as the result of a collision caused by the negligent operation of the vehicle by its uninsured and impecunious owner-operator, Jordan, while Wilkerson was riding as a passenger in the vehicle. Respondent Wilkerson had completed his work for the owner-operator earlier that day. Wilkerson worked from time to time as a helper, assisting in the loading of furniture into a few different owner-operators' trailers when they were in the general locale of Wilkerson's home in northern New Jersey. At the time of the accident, the tractor-trailer was subject to a lease agreement by which the owner-operator had leased the tractor-trailer to Fisher and Brother, Inc. The latter had, in turn, leased the vehicle to Allied Van Lines, under whose Certificate of Public Convenience and Necessity the vehicle was being operated. At the time of the accident, Mr. Wilkerson was not a licensed tractor-trailer operator; in fact, had never driven a tractor-trailer, nor was he a person whose presence on the job was in any way required by I.C.C. Regulations or any of the leases, but was merely a furniture mover's helper. In fact, at the time of the accident, his day's work of helping load the trailer had been completed, he had been paid in cash by the owner-operator and he was simply catching a ride part of the way home as a matter of his convenience.

At the time of the accident, Wilkerson was not engaged in any work for Allied, the owner-operator, or anyone else. He was

never a part of any I.C.C. mandated driving team and the vehicle was not required to have two operators, nor was a helper to load the furniture required by regulations or lease.

Petitioner Allied had argued below, in the trial court, in the Superior Court of Pennsylvania and in the Pennsylvania Supreme Court, that the issue is whether Wilkerson was an employee of the owner-operator of the vehicle and whether he has the status of a member of the travelling public for the purpose of imposing liability based upon the I.C.C. Regulations on the I.C.C. license holder. Petitioner Allied has failed in its petition for writ of certiorari to admit that in the particular facts of this case Wilkerson was not, at the time of the accident, working for anyone, but was no more than a hitchhiker in the vehicle. At the time of this accident his work of helping to load the vehicle had been completed and he had been paid before the accident occurred.

B. Procedural History of the Case

The case arose out of a two-vehicle accident which occurred on June 16, 1977, in northern New Jersey. Suit was instituted against Allied Van Lines, Inc. and Fruehauf Trailer, a Division of Fruehauf Corporation.

At the trial, Allied insisted that the issue of whether or not Wilkerson was a member of the travelling public under the applicable federal regulations was an issue of fact for the jury, rather than an issue of law for the court. The jury decided that under the particular facts of the case, Wilkerson was a member of the travelling public. On appeal to the Pennsylvania Superior Court, Allied argued that the trial judge's instructions to the jury were erroneous. The Superior Court found that the trial judge had committed no error and that in any event under the particular facts of this case, Wilkerson was, as a matter of law, simply another member of the travelling public and entitled to the

protection of the Interstate Commerce Act and the regulations promulgated by the I.C.C. Following the decision of the Pennsylvania Superior Court, Allied filed a petition for allowance of appeal to the Supreme Court of Pennsylvania which, after briefing and oral argument, dismissed the petition as being improvidently granted.

REASONS FOR DENYING THE WRIT

The decision below is based upon the precise facts of the case and is not in conflict with the decision of the United States Court of Appeals for the Fifth Circuit. *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir. 1979), *cert. denied*, 444 U.S. 965 (1979). That decision was based upon the fact that the lease agreement and the federal regulations involved in that case, required the vehicle to have two drivers, each of whom was an "indispensable part of the interstate driving team".

In the instant case, the facts are simply different. Mr. Wilkerson was not a member of a federally mandated two-person driving team. Neither federal regulations nor the lease agreement between Allied and Fisher & Brother, or Fisher and the owner-operator, required the owner-operator to employ another driver or helper to assist in loading the vehicle.

In reaching its decision under the facts of the instant case that Wilkerson was a member of the travelling public, the Pennsylvania Superior Court pointed out that the accident had not occurred until after the work for which Wilkerson had been hired, *i.e.*, loading the trailer, had been completed, and that Jordan was gratuitously providing Wilkerson transportation to a convenient destination.

It is important and factually unique to the instant case to note that unlike the facts in the *White* case where the Court of

Appeals concluded that White was in effect a "statutory employee" of the I.C.C. license holder under the law of Georgia (the state where the accident occurred), and a "statutory employee" under Georgia law, was barred from a recovery in tort against his "statutory employer" and limited to a recovery under worker's compensation. The law of New Jersey (where the instant accident occurred and which by stipulation of the parties governed the facts of this case), is totally different. A "statutory employee" is not limited to worker's compensation benefits in New Jersey, but may proceed in tort against his "statutory employer". *Boehm v. Witte,* 95 N.J. Super. 359, 231 A.2d 240 (1967). Therefore even if Mr. Wilkerson were considered to be a "statutory employee" of petitioner Allied at the time of the accident, that would not preclude him from maintaining a third party action against Allied.

In the instant case Allied at all times denied, under oath that Wilkerson was its employee, its statutory employee or that he had any relationship to it whatsoever. Factually, Allied never paid one cent of worker's compensation benefits to anyone, and as pointed out above, under New Jersey's worker's compensation law, even if they had, it would not have barred recovery by Wilkerson, but merely created a set-off as to any amount paid by Allied. *Boehm v. Witte, supra.*

Wilkerson, when injured, was in no way engaged directly or indirectly in the furtherance of the economic interest of Allied. He was not working for Allied, Fisher, or even the owner-operator at the time of the accident.

In *Proctor v. Colonial Refrigerated Transportation, Inc.,* 494 F.2d 89 (4th Cir. 1974), the Court of Appeals for the Fourth Circuit explained in a well-reasoned opinion that Proctor, an employee of the owner-operator, was not himself the owner or operator of the vehicle, had no contractual relationship with the

I.C.C. license holder, Colonial, and was as much a stranger to Colonial as any shipper of goods in the vehicle or any other member of the public travelling on the highway; hence, was entitled to recover from Colonial for the negligent operation of the vehicle by its owner-operator, operating the vehicle under the auspices of the I.C.C. license holder, Colonial, at the time of the accident.

Factually, Mr. Wilkerson had been hired by the owner-operator, not petitioner Allied, for a few hours work on the day of the accident to help him load household furniture at the shipper's home. The loading was completed and as was the custom, the owner-operator paid Wilkerson for the hours of work performed that day.

Wilkerson's work was completed. If it had been convenient for him to do so, he could have walked home from the shipper's home; instead, he asked the owner-operator to drop him off at a convenient spot. Wilkerson was simply catching a ride in the vehicle to a convenient drop-off point when the accident occurred due to the failure of the tractor-trailer to negotiate a steep curving hill, either due to the negligent operation of the vehicle by the operator or the defective condition of the vehicle's brakes.

No provisions of the I.C.C. Regulations or the leases, required or prohibited the owner-operator from giving a ride to a hitchhiker, having someone help him load household furniture, or loading the furniture himself.

The charges imposed on the shipper, and the compensation of Allied, Fisher & Bros. and the owner-operator were all based on the amount of household goods carried and the distance the furniture was to be carted, and had nothing whatsoever to do with time of loading, the shipment or number of helpers, if any.

In short, the presence of Wilkerson in the vehicle at the time

of the accident was factually less related to the I.C.C. license holder than the presence of the shipper's furniture in the vehicle. Clearly, the I.C.C. Regulations require Allied, the license holder, to pay damages to the shipper and to any other member of the public using the highway should injury occur due to the negligence of the owner-operator or the defective condition of the "borrowed vehicle". *Proctor v. Colonial Refrigerated Transportation, Inc., supra.*

It is critical in the analysis of the issue to look at the historical and public policy reasons for the federal regulations involved. The historical and policy reasons are best expressed in *Price v. Westmoreland,* 727 F.2d 494 (5th Cir. 1984) by the Court of Appeals for the Fifth Circuit:

> "In order to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles, Congress in 1956 amended the Interstate Common Carrier Act to require a motor carrier to assume full direction and control of leased vehicles. 49 U.S.C. § 10927(a)(2) and § 11107(a)(4)(formerly 49 U.S.C. § 315 and § 304(e)(2) respectively). Pursuant to these regulations the ICC has promulgated written lease requirements for interstate carriers . . . which require the carrier lessee to 'assume complete responsibility for the operation of the equipment for the duration of the lease'. 49 C.F.R. § 1057.12(d)(1)."

The owner-operator, as it turned out, was uninsured and judgment-proof, hence Wilkerson, like any other member of the public using the highway, sought recovery from Allied in tort for his injuries.

Because of the specific facts of this case, the decision reached by the trial court and sustained by the Pennsylvania appellate court is not in opposition to the decision of the Fifth Circuit in *White v. Excalibur, supra.* Nor does the rationale of the decision of the Fifth Circuit in *White* conflict with the decision in this case since, under the facts and the worker's compensation law of New Jersey, the I.C.C. license holder (in that case Superior Trucking Company) in the instant case, Allied, had no worker's compensation liability to Wilkerson, never paid any worker's compensation to Wilkerson, and in a further distinction from *White*, would not under the New Jersey State worker's compensation law been immune from tort liability to a person in Wilkerson's position even if they had been required to pay any worker's compensation benefits to him. It is critical to note, that in the case *sub judice*, Allied denied under oath that Wilkerson was its employee, its statutory employee, or had any relationship of any kind to Allied. Allied was never called upon to pay one cent in worker's compensation to Wilkerson or anyone else relative to the accident which led to this litigation. Contrary to Allied's assertions, there is no conflict between the Fourth and Fifth Circuits. Allied admits in footnote 2 on page 9 of its brief, that the significant difference between the *Proctor* and *White* cases is that no worker's compensation benefits were available in *Proctor*, while they were available in *White*.

To argue as petitioner does that to permit the decision of the Pennsylvania Superior Court in this case to stand would have a serious and widespread impact upon the trucking industry operating in interstate commerce, is to deny reality and to "stuff the rabbit into the hat". The facts of this case are unique. It is inconceivable that it creates precedent for any case other than one in which a hitchhiker in the vehicle who coincidentally had, earlier in the day, helped load a trailer was injured due to the negligence of the operator and/or the defective condition of the

vehicle, and sued the I.C.C. license holder under applicable federal statutes and regulations.

CONCLUSION

The petition for writ of certiorari to the Superior Court of Pennsylvania should be denied for the following reasons: (1) The decision is not in conflict with a decision of the United States Court of Appeals for the Fifth Circuit. The decision of the state Superior Court reaches the same conclusion as the United States Court of Appeals for the Fourth Circuit, as well as the Court of Appeals of New Mexico, *Matkins v. Zero Refrigerated Lines, Inc.*, 93 N.M. 511, 602 P.2d 195, 200 (1979), and by the Supreme Court of Minnesota in *Schindele v. Ulrich*, ____ Minn. ____, 268 N.W. 2d 547 (1978). The facts significantly differ from the facts in *White* since Mr. Wilkerson was not an "indispensable part of the interstate driving team", was not required by regulation or lease agreement and factually was not even working for the owner-operator at the time of the accident; and (2) There is no conflict between the Fourth and Fifth Circuits. While *Proctor* and *White* reach different conclusions, the cases as petitioner Allied admits, are based on significant differences of fact and significant differences in the interpretation of various state laws as they impact on the rights and obligations of parties; and there is no confusion in the interpretation of the Interstate Commerce Act and the I.C.C. Regulations as they impact on the rights and legal obligations of the parties to this case under the *specific* facts of this case.

Respectfully submitted,

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